Supreme Court of the United States

OCTOBER TERM, 1951

NO. 151

THE UNITED STATES OF AMERICA
ET AL.,

Appellants,

VS.

GREAT NORTHERN RAILWAY COMPANY,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF MINNESOTA

BRIEF FOR GREAT NORTHERN RAILWAY COMPANY, APPELLEE

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MISCELLANEOUS

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Appeal from a three-judge District Court judgment setting aside an order of the Interstate Commerce Commission prescribing certain joint through freight rates and the divisions thereof.

OPINIONS BELOW

The opinion of the District Court (R. 592-595) is reported in 96 F. Supp. 298. The report of the Interstate Commerce Commission (R.10-24) is at 275 I. C. C. 512.

JURISDICTION

The final judgment of the District Court was entered March 27, 1951 (R. 604). Petition for appeal by United States of America and Interstate Commerce Commission was allowed May 23, 1951 (R. 610). An order allowing Board of Railroad Commissioners of the State of Montana, Valier Community Club, and Montana Western Railway Company to be included in the appeal was filed May 25, 1951 (R. 616). Jurisdiction of this Court is invoked under 28 U. S. C. Secs. 1253 and 2101 (b). Probable jurisdiction was noted October 8, 1951 (R. 622).

QUESTIONS PRESENTED

The Interstate Commerce Commission ordered Montana Western Railway Company and Great Northern Railway Company[1] to establish (1) joint through freight rates on grain from points on the Montana Western to points on the Great Northern, and (2) certain divisions of such rates. Each joint through rate so ordered was to take the place of an existing combination rate comprised of Montana Western's separately established rate for transportation to its junction with Great Northern and Great Northern's rate for transportation beyond. The Commission made no finding that the existing combination rates, or the separate factors thereof, were unreasonable or otherwise unlawful. The joint through rates ordered require no change in the through freight charges shippers must pay. The prescribed divisions thereof, to be effective when the joint rates are established, would increase Montana Western's revenues by about 80 percent and reduce Great Northern's proportionately. The

[1]Hereinafter called "Montana Western" and "Great Northern".

single purpose of the order is to assist Montana Western in meeting its financial needs.[2] The questions presented are:

1. Whether in view of Section 15 (4) of the Interstate Commerce Act as amended by the Transportation Act of 1940,[3] which provides in part—

> "No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs,"

the Court below properly held that the Commission exceeded its statutory powers in ordering joint through rates between Montana Western and Great Northern points.

2. Whether in view of Section 15(6) of the Interstate Commerce Act[4] the Court below was correct in holding invalid the Commission's order purporting to prescribe divisions of joint through rates without findings that any existing divisions were or would be "unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto," and without findings that the existing apportionment of through revenues under combination rates violates some statutory standard.

3. Whether the Court below rightly held that the Commission's order was not sustained by and was contrary to the evidence. This includes, among other things, the question—

(a) whether the Commission in determining the divisions, gave improper weight to a rate scale it conceived for

[2]The Commission says at 275 I. C. C. 525:
"The increased revenues for the Montana Western under the divisions herein prescribed are needed to insure safe and efficient operation of that carrier's line and to pay interest on its indebtedness to the Great Northern."

[3]49 U. S. C. Section 15, par. (4), 41 Stat. 485 as amended by 54 Stat. 911, 912.

[4]49 U. S. C. section 15, par. (6), 41 Stat. 486.

a different type of traffic in a prior unrelated proceeding, without evidence that the transportation conditions there considered were comparable with those attending the movement of Montana Western grain at the existing combination rates, and

(b) whether the Commission properly prescribed divisions to be participated in by Great Northern in the absence of evidence as to the amount of revenue required to pay that carrier's operating expenses, taxes and a fair return on its railway property, a matter directed to be considered in determining divisions under said Section 15 (6).

4. Whether the Commission deprived Great Northern of the "full hearing" specified in Section 15(3) of the Interstate Commerce Act[5] and in said section 15(6) in contravention of due process (United States Constitution, Amendment V) by (a) requiring hearing and determination on a "common record" of the question whether joint through rates should be established with the separate question of what the divisions of any joint through rates so established should be; (b) by incorporating into the record and considering in the determination of the joint through rate issue voluminous evidence as to the financial needs of the Montana Western received in a proceeding to which the Great Northern was not a party and at a hearing at which it was not represented; and (c) by according substantial weight to other matters *de hors* the record enlarged by such incorporation.

[5] 49 U. S. C. Section 15, par. (3), 41 Stat. 485, as amended by 54 Stat. 911, 912.

STATUTES INVOLVED

The relevant provisions of the Interstate Commerce Act and of the Constitution of the United States are set forth in Appendix "A", *infra*, pp. 74 to 80. Reference herein to statutes by section number only are, unless otherwise indicated, to sections under Title 49, United States Code.

STATEMENT

The Montana Western

Montana Western is a short line extending 20 miles between Valier, Montana, a station only on the Montana Western, and Conrad, Montana, a station on both the Montana Western and Great Northern. (See map, Appendix B, *infra*, following page 80.) It was incorporated in 1909 and its railroad was built in that year (R. 12). It is owned and controlled by the Valier Company, successor of a land irrigation company which supplied $150,000 toward building the railroad (R. 13, 81, 91). At the time of construction Great Northern loaned Montana Western the remaining funds needed to complete the line and took as security a first mortgage bond of $165,000. No interest has ever been paid on this obligation, the principal has never been reduced, and the maturity date has been twice extended (R. 13, 79-81; Commission Exhibits 3, 4 and 5).

Great Northern owns none of the capital stock of the Montana Western or of the Valier Company (R. 81; Commission Exhibit 6). Valier Company is controlled by Cargill Securities Company (R. 14). Cargill Securities Company has no connection with Great Northern (R. 105).

The Montana Western, acting on its own judgment, estab-

lished the separately published grain rates for application on its line (R. 130-131). Its general manager believes that these rates are "as high as you can get for the services offered" *(id.)*. If the Montana Western should attempt to increase these rates and if the Interstate Commerce Commission should not suspend the proposed increases, the management fears that this "might force all the business into trucking" (R. 131). The record does not indicate that the Great Northern has taken any part in the establishment or the continued maintenance of these rates.[6]

There are four stations on the Montana Western. Valier, its western terminus, has a population of about 800 and Conrad, its eastern terminus and interchange point with the Great Northern, has a population of about 2000. There are two non-agency stations on the Montana Western: Manson, seven miles from Conrad, and Williams, 14 miles from Conrad, having an estimated population of 10 and 11, respectively. The approximate area served by the Montana Western exclusive of Conrad is about 553 miles and the population about 2000 (R. 12).

The Montana Western was not built according to accepted standards of economical maintenance. Untreated cross-ties were laid on the ground with practically no ballast. As a result, drainage is almost nil on the greater portion of the

[6] Appellants state, erroneously, that the Great Northern played a role in the establishment of Montana Western's rates and practices (Brief of U. S. and I. C. C., p. 14). The record does not support this assertion. The only record references cited by appellants in claimed support thereof indicate (1) that many years ago the Great Northern repaired a Montana Western locomotive (R. 155), (2) that before Montana Western employes may operate over three miles of Great Northern's tracks they must "be examined by the Great Northern on the Great Northern's Book of Rules" (R. 175); and that the Great Northern at one time negotiated with a shipper an intrastate rate on sugar beets from Montana Western points to a Great Northern station at which a beet sugar factory was located (R. 247). Sugar beets constituted less than one-half of one per cent of the Montana Western's carload traffic in the three years and nine months preceding the second hearing (Commission Exhibit 43).

line and cross-ties deteriorate rapidly. There is a pile bridge over the Dry Fork of the Marias River which was damaged by flood in 1948 and is in need of repairs, the cost of which will exceed $5000. The roundhouse must be replaced at a cost of about $7000. The rolling stock consists of one gasoline-electric locomotive, one steam locomotive and one flat car (R. 14). The key grade is three per cent and is against the outbound movement and limits the capacity of the steam locomotive to eight carloads and the gas-electric locomotive to two carloads of grain (R. 18). There are 13 employees (R. 14). Train service consists of a mixed train making a round trip daily except Sundays, carrying such passengers, mail, L. C. L. and carload freight as is offered (R. 13).

While there are no common carrier motor trucks or motor bus lines serving stations on the Montana Western except Conrad, there are motor truck and motor bus services daily on Federal Highway No. 91, running north and south through Conrad. An oil-surfaced highway runs between Valier and Highway 91. The highway distance between Conrad and Valier is 23 miles. A graveled highway runs southwesterly from Valier connecting with U. S. Highway No. 89 (R. 15; see map, R. 69).

During the period from 1924 to the end of 1948, the Great Northern made advances to the Montana Western to cover its operating losses (R. 15). Montana Western's deficits averaged over $18,000 a year for the period from 1933 to 1948, and it has been able to continue in operation solely because of such advances (R. 15, 17). In July of 1949, Montana Western owed Great Northern $737,604 (R. 13). The operating deficits of Montana Western have shown an increasing trend with rising operating costs (R. 527; Commission Exhibit 11). In December of 1949 the prospect for

1950 was for expenses, necessary to continue safe operation, which would exceed revenues by $57,440 (R. 515-516). Great Northern has made no advances since early in 1949 (R. 15).

The area served by Montana Western produces from 800,000 to 1,000,000 bushels of grain annually. In the last ten or fifteen years the population has "probably decreased, or stayed static, but the farming units have become larger" (R. 342).[7]

About 90 per cent of Montana Western's traffic is grain originating on its line moving beyond Conrad to interstate destinations (Commission Exhibit 43). This has averaged about 500 cars a year at 50 tons a car for the decade preceding the hearings (R. 16, 515, 525). Montana Western's general manager believes that there is no prospect for an increase in its traffic (R. 133).

There were, in July of 1949, seven grain elevators and one mustard seed elevator on the Montana Western (R. 276). Later that year one of the grain elevators at Valier burned (R. 487). The record contains testimony, usual in abandonment cases, that the local shippers who have supplied the relatively small amount of traffic on this railroad depend upon it for transportation and upon these grain elevators located on trackage for storage of their grain (R. 245 et seq.). However, of the present six grain elevators on the line, two, which are owned by Cargill, Inc., will continue in operation if the railroad is abandoned, moving grain out by truck (R. 185, 214). The four elevators which might be affected by abandonment of the railroad have a

[7] Appellants apparently on the basis only of testimony that farming "units" have become larger state that "the amount of land under cultivation is still increasing" (Brief of U. S. and I. C. C., p. 14).

total capacity of 205,000 bushels (R. 270, 339, 343) compared with an undisclosed capacity of the two grain elevators which will remain on the line and with 400,000 bushels of grain storage capacity being utilized on farms (R. 466, 471). "The absolute minimum of new farm storage" built in 1949 in the trade area was stated to have a capacity of 200,000 bushels. This was in addition to the farm storage capacity already there (R. 466, 335). The increase in farm storage capacity has been encouraged by the Commodity Credit Corporation by allowances in connection with wheat loans (R. 16, 264). There was some testimony by local shippers that the trucking of grain from the area is not practicable, but trucking to elevators in Montana for distances of 30 and even 75 miles has taken place (R. 475, 485, 496). The testimony concerning the impracticability of trucking may be contrasted with that of the general manager of the Montana Western that an increase in its grain rates would not permit it to hold its traffic against truck competition (R. 131, 133) and with the representation by Cargill, Inc., previously referred to, concerning continuance of its two elevators. When the elevator at Valier burned, as previously stated, about 20,000 bushels of salvaged grain, or approximately 12 carloads, was trucked out a distance of 50 miles instead of being shipped by rail (R. 487).

In the event of abandonment of the railroad those grain producers on the line who would not then deliver their grain direct to the two or more elevators still remaining would haul it eventually an average of about 25 miles to the nearest rail head instead of the present average haul of 7½ miles (R. 16). By doing so, however, they would get a rate to Minneapolis and other eastern terminals 6 cents lower than the present rate from Valier and 5½ cents lower than from

Williams, and correspondingly lower rates to Seattle and Spokane, Wash., and this would increase the price of their grain by about $1.10 to $1.20 a ton. A heavy shipper of grain located west of Valier, testified

> "***it is to my own personal advantage to haul my grains into Pendroy [on the Great Northern] rather than to haul them into Valier. I can do it on a blacktop road and I can get more money for it by shipping it out of Pendroy because of a freight rate differential ***." (R. 464).

Most of the farmers in the area ship their cattle by truck either to Great Falls, Mont., or to Shelby, Mont. A few carloads of sheep are handled annually but sheep represent less than one per cent of Montana Western's traffic (R. 17; Commission Exhibit 43). Valier is served by a natural gas pipeline and natural gas is generally used for heating, and this has reduced the tonnage of inbound coal by rail (R. 17). There is a bulk oil storage plant at Williams, but most of the oil stored in this plant is now brought in by motor truck (R. 18). Passenger revenues were $259 in 1948 (R. 18).

Proceedings Before the Commission

On March 29, 1949, Montana Western applied to the Commission for a certificate of public convenience and necessity authorizing abandonment of its railroad (R. 49-52). The application as subsequently amended covered its entire line (R. 76-77). Great Northern was not a party to this proceeding. A hearing was duly held thereon July 11-13, 1949 (R. 71-403).

Before decision of the abandonment application and on August 1, 1949, Valier Community Club, a "voluntary organization of citizens", filed with the Commission a complaint naming Montana Western and Great Northern as defendants (R. 403-408). The complaint in the latter proceeding, as subsequently amended (R. 430-432), sought the establishment of joint through rates on grain, in carloads, from points on the Montana Western to points on the Great Northern and establishment of divisions of such rates. Both defendants answered and asked dismissal of the complaint (R. 408-424). Great Northern also moved for an order striking from the prayer the request that the Commission prescribe divisions of any joint rates which might be ordered (R. 424). The Commission denied the motion and on its own initiative ordered that a further hearing be held in the abandonment proceeding and that both the abandonment case and the joint rates and divisions case "be heard or further heard for disposition upon a common record" (R. 425). The order contained a provision that witnesses previously heard in the abandonment proceeding should be made available for cross-examination by Great Northern at the hearing in both cases later to be held (R. 425). There was thereby incorporated into the record in the joint rates and divisions case 712 pages of testimony and 28 exhibits received in a proceeding to which Great Northern was not a party and at a hearing at which it had not been represented (R. 71-403).

At the subsequent hearing December 5-6, 1949 (R. 426-567), Great Northern renewed its motion to dismiss from the prayer of the complaint the request for divisions (R. 429) and it also moved the Commission to rescind the order consolidating the abandonment proceeding with the

joint rates and divisions case (R. 433). Both motions were denied (R. 430, 434).

After a recommended report by the trial examiner who presided at the second hearing (R. 567-581), exceptions were taken and the Commission heard the parties in oral argument (R. 591). It issued a report and order in the consolidated proceedings, dated July 31, 1950, denying the Montana Western's application for authority to abandon and prescribing joint through rates on grain from points on the Montana Western to points on the Great Northern and the divisions of such rates (R. 10-25). Only the portion of the order prescribing joint rates and divisions is here in issue.

The Commission's order requires (1) that Great Northern and Montana Western establish for the interstate transportation of grain from points on the line of Montana Western to points on the line of Great Northern "joint rates which shall not exceed the present combinations of proportional rates [8] to and from Conrad, Mont.", and (2) that they establish certain prescribed divisions of such rates (R. 25). Though the establishment of the joint through rates will not require a change in existing through charges to shippers, the prescription of divisions of such rates will increase the revenues of the Montana Western now received from its

[8] The present separately published rates are proportional rates. "Proportional rates are separately established rates applicable to through transportation being separate parts of through rates." *Port of Beaumont, Tex. v. Agwilines, Inc.*, 243 I. C. C. 679, 683. A joint through rate is a rate published as a unit to apply from a point on one line to a point on another under proper concurrence of all transportation lines over which the rate applies. *Canton R. Co. v. Ann Arbor R. Co.*, 163 I. C. C. 263, 265; *L. & N. R. R. Co. v. Sloss-Sheffield Co.*, 269 U. S. 217, 233.

In the instant case the proportional rates of the Montana Western to Conrad which apply only on traffic destined beyond are somewhat lower than their local rates applying on traffic terminating at Conrad; and likewise the Great Northern's proportional rates from Conrad applying on traffic coming from beyond are lower than its local rates applying on traffic originating at Conrad.

separately published proportional rates by what the Commission estimates at $58,000 annually (275 I. C. C. 525; R. 23) and by what Great Northern estimates to be at least $35,000 annually (R. 9). In its report the Commission makes findings that "it is necessary and desirable in the public interest that joint through rates be established" and that the prescribed divisions are "just, reasonable and equitable" (275 I. C. C. 526; R. 24). On the page of the report preceding these findings (275 I. C. C. 525; R. 23) is the following statement:

> "The increased revenues for the Montana Western herein prescribed are needed to insure safe and efficient operation of that carrier's line and to pay interest on its indebtedness to the Great Northern."

There is no finding by the Commission that the existing combination rates are unreasonable or otherwise unlawful and no finding that the separate factors of such rates are violative of any statutory standard. There is no finding that the existing apportionment of revenue violates any statute.

Grain Rates and Services Covered Thereby

The proportional rate of Montana Western is 9 cents per hundred weight[9] from Valier to Conrad, 20 miles, and the proportional rate of Great Northern from Conrad to Minneapolis is 62½ cents for 1030 miles, making a total through-charge of 71½ cents (R. 19, 22). The proportional rate of the Montana Western from Williams is 8½ cents and the proportional rate from Conrad to Seattle, Washington, for example, and points taking the same rate, is 58½ cents,

[9] Rates and divisions are stated in cents per 100 pounds unless indicated otherwise.

making a total through charge of 67 cents from Williams to Seattle (*id.*).

The proportion of through revenues which the Montana Western presently derives from the transportation of grain and the effect of the joint through rates and divisions ordered on this traffic appears by taking as an example the transportation of grain from Valier to Minneapolis. Under the present arrangement the Montana Western, with only 1.9 per cent of the 1050-mile haul, receives 12.6 per cent of the through charges. Under the joint rates and divisions prescribed the revenue of the Montana Western would be increased from 9 cents to 16½ cents and its proportionate share of the through charges increased from 12.6 per cent to 23 per cent (R. 23). The Great Northern would have its present compensation for 98.1 per cent of the haul reduced from 87.4 per cent to 77 per cent of the total through revenue (*id.*).

On all grain and mustard seed handled during the three years and nine months from January 1, 1946, to September 30, 1949, Montana Western received 12.8 per cent of the total through revenue for performing 1.9 per cent of the total haul, and Great Northern received 87.2 per cent of the total through revenue for performing 98.1 per cent of the total haul (Commission Exhibits 43, 45; R. 543-545). The Commission's joint rate and divisions order would increase the share of Montana Western from 12.8 per cent to from 22 to 29 per cent of the through revenues on grain (depending on the destination involved) and reduce Great Northern's share proportionately (R. 23).

Montana Western grain moving to Great Northern points does not receive services from the Montana Western com-

parable with the services it receives from the Great Northern.

The box cars which originate the grain traffic and the grain doors which are required to seal the cars, both of which an originating line normally furnishes, are supplied by the Great Northern and not by the Montana Western. These box cars are furnished under a special, liberal, per diem arrangement pursuant to which in a representative 31-month period the Montana Western paid per diem for only 555 car days, though the number of actual days on the Montana Western was 4,746, the Great Northern assuming the regular per diem to foreign lines on foreign cars (R. 333, 345; R. 547, 548).

The service of stopping and holding grain cars for inspection and also services incident to transit are covered by the line-haul rates on grain; that is, no additional charge is made by the railroad on whose line inspection or transit takes place. Under such line-haul rates the destination line also assumes at no extra charge the cost of switching cars over tracks of other railroads to reach mills and elevators at terminal markets. Such services are required because of the many trade practices incident to the transportation and marketing of grain which are peculiar to that traffic. Neither inspection nor transit is accorded by Montana Western. These services are provided on the Great Northern. The Montana Western does not absorb any off-line switching charges but the Great Northern does so in connection with all shipments to mills and elevators at Minneapolis, St. Paul and Duluth, Minnesota, and Superior, Wisconsin (R. 548). The inspection service on the Great Northern involves the switching of cars to hold tracks and the holding of cars on such tracks until the inspection of samples with-

drawn from the cars is reported. Each transit on the Great Northern calls for two terminal services, for delivery of and origination of the transited traffic, including two switching movements, 48 hours' free time on the car when unloaded, and 48 hours' free time when loaded. When products of grain are shipped out from transit points, the Great Northern furnishes on an average 1.52 cars for each car of grain moved to the transit point (R. 548).

Factors which were stated to have been considered by the Commission in reaching its ultimate findings.

The Commission recites four considerations entering into the ultimate findings referred to *supra* (p. 13) and which it made to support its order prescribing joint through rates on grain moving from Montana Western points to Great Northern points and the divisions thereof sharply increasing Montana Western's revenues for its disproportionate haul. These considerations were:

(1) *The relationship between the present proportional rates of the Great Northern and Montana Western and the so-called Appendix-10 scale of class rates established in Class Rate Investigation, 1939, 262 I. C. C. 447, and set forth at 262 I. C. C. 766 (R. 22-23).*

The Commission said that this comparison showed the Great Northern's proportional rates to be "relatively higher" than Montana Western's *(id.)*. This class-rate scale was established in an unrelated Commission proceeding and was intended only for class-rated traffic moving east of the Montana-Dakota state line (262 I. C. C. 512). It never became effective on any traffic, for the *Class Rate Investigation* in which the scale was fixed was reopened and the re-

opened case had not been decided at the time of the Commission's order and the District Court hearing (R. 583, 608). There was no evidence that the peculiar conditions attending the transportation of grain from Montana Western to Great Northern points, including the furnishing of grain doors by the destination line, the furnishing of cars to the originating line by the destination carrier under a special, liberal per diem agreement, and the described service of the Great Northern incident to inspection and transit, resembled conditions attending the movement of class-rated traffic in the east when *Class Rate Investigation, 1939,* was decided, or at any other time. No mention of the *Class Rate Case* or of the Appendix-10 scale appeared in the entire record submitted to the Commission for decision.

(2) *Comparison of car-mile revenues under Great Northern's proportional rate from Conrad to Minneapolis with its car-mile revenues under local rates to Minneapolis from certain Montana points.* The Commission compared the car-mile revenues [10] on grain from Pendroy, a Great Northern point at the end of a branch line not far from Valier, to Minneapolis, and the car-mile revenues from Augusta, another Great Northern point, with those from Conrad (R. 23). The car-mile revenues from Pendroy and Augusta were computed under the Great Northern's single-line *local* rate of 65½ cents (R. 20). The *proportional* rate from Conrad was 62½ cents (R. 23). There was no evidence that these rates from Pendroy and Augusta were not selected examples of local rates from origins in a large group or blanket territory or that other origins in Montana closer to Minneapolis might not have been picked from the same ori-

[10] The freight charges on a particular carload movement divided by the distance in miles.

gin group which would produce a different showing. The Commission did not find the Great Northern's proportional rate from Conrad, which is lower than the compared local rates, to be unreasonable. [11]

(3) *The fact that on certain traffic to Minneapolis and Duluth the Commission considered the Great Northern an "intermediate" carrier and concluded that "in some instances it receives additional revenue on traffic beyond these two points"* (R. 22). There was no evidence that the Great Northern acted as an intermediate carrier on the traffic above described or that it received additional revenue on Montana Western grain going beyond Minneapolis or Duluth. There was, on the contrary, evidence that it acted as a destination carrier on most of this traffic (Commission Exhibits 41 and 44; R. 541), absorbing destination switching charges of other lines (R. 548).

(4) *The financial necessities of the Montana Western* (R. 23). These necessities were the consideration which motivated the Commission's prescription of joint rates on the same level as existing combinations as a foundation for fixing divisions increasing Montana Western's revenues. Appellants so concede (Brief of U. S. and I. C. C., p. 25). The Commission, however, did not state that it gave consideration to "the amount of revenue required to pay *** [the] operating expenses, taxes and a fair return" on the property of the Great Northern in prescribing "just, fair and equitable" divisions under Section 15 (6). There was no evidence on that subject.

[11] Appellants say that "on *** proportional traffic Great Northern *** avoids the expense incident to the origination of freight (Brief of U. S. and I. C. C., p. 20). Great Northern does not, however, avoid such expense where the Montana Western is the originator. (See discussion, *supra*, p. 15.)

The District Court Proceeding

The present action was brought in the United States District Court for the District of Minnesota, Fourth Division, under 28 U. S. C. 1336, 1398, 2284, 2321-2325, to enjoin and set aside the order of the Commission insofar as it prescribed joint rates and divisions. Its enforcement was enjoined and the order set aside and annulled by the judgment below (R. 604-605). (The Commission's order which denied Montana Western's application for abandonment and which is not here involved has been postponed so as not to become effective until the Commission's further order (R. 48-49).)

In arriving at the conclusion that enforcement of the Commission's order should be enjoined and the order set aside, the District Court found: (1) that the action of the Commission in the prescribing of joint through rates on the same level as existing lawful combinations solely as a foundation for fixing divisions which would allow the Montana Western a substantially increased proportion of the through revenue was but a means to the end of assisting the Montana Western to meet obvious financial needs, which was expressly prohibited by Section 15 (4) of the Interstate Commerce Act (R. 594, 602); (2) that the order fixing divisions was not supported by findings that any existing divisions have been, are, or will be unlawful or that the existing apportionment of through charges has been, is, or will be unlawful in any respect, and that this omission to find the essential jurisdictional facts upon which the power to prescribe divisions depends, was inconsistent with this Court's holding in *Beaumont, S. L. & W. Ry. Co. v. United States*, 282 U. S. 74, 82, and similar cases (R. 593, 602); and (3) that the Commission's order was not sustained by the evidence but was contrary thereto (R. 594, 602).

SUMMARY OF ARGUMENT

I.

The District Court rightly held that the Commission exceeded its statutory powers in prescribing joint through rates on the same level as existing lawful combinations solely as a foundation for fixing divisions to assist the Montana Western in meeting its financial needs.

A. The Court below held that the order was invalid as outside the authority granted by Section 15 (3) as limited by Section 15 (4). Section 15, paragraph (3) of the Interstate Commerce Act empowers the Commission to establish "through routes and * * * joint rates" whenever found "necessary or desirable in the public interest". Section 15, paragraph (4), provides in part:

> "No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

This Court said, with reference to that section, in *United States v. Missouri Pac. R. Co.*, 278 U. S. 269, 276-277:

> "The general language of paragraph (3) is limited by paragraph (4)."

The Commission, following the language of paragraph (3), found that it was "necessary and desirable in the public interest that joint through rates be established * * * from points on the Montana Western to points on the Great Northern" (R. 24). But the purpose of the joint through rates ordered, which required no change in the

through charges, was to serve as a foundation for divisions which would assist Montana Western to meet obvious financial needs. The District Court held this to be expressly forbidden by the plain language of Section 15, paragraph (4).

B. The prohibition contained in Section 15 (4) against establishment of a through route and joint rates to assist a carrier financially is not confined, as appellants contend, to such through routes and joint rates as would require short-hauling.

1. The unqualified, plain language of Section 15 (4) forbids emasculation by construction. *United States v. Missouri Pac. R. Co., supra.* The context in which it is found requires that it be enforced as written so as to prohibit the Commission from establishing through routes and joint rates to assist a carrier to meet its financial needs. The statutory prohibition exists whether short-hauling be required or not.

2. Enforcing Section 15 (4) as written does not create a conflict with Section 15 (3) or Section 15 (6) of the Act or with the Commission's duties thereunder. Any conflict thought to exist would not be removed by limiting the application of the prohibition contained in Section 15 (4), as appellants suggest, to those cases requiring short-hauling. Sections 15 (3), 15 (4) and 15 (6) must be applied in *pari materia.* Section 15 (4) prevents exercise of the Commission's power to establish through routes and joint rates under Section 15 (3) where the purpose is to enable a carrier to meet its financial needs, whether short-hauling be required or not. Once through routes and joint rates are lawfully established and there are revenues thereunder to be divided.

the Commission may prescribe divisions thereof as provided in Section 15 (6). In the determination of divisions the Commission shall consider the financial needs of the participating carriers. It must be remembered, however, that Section 15 (6) does not come into play until the through routes and joint rates have been established. *Baltimore & O. R. Co. v. United States*, 298 U. S. 349, 356-357; *Beaumont, S. L. & W. Ry. v. United States*, 282 U. S. 74, 82. In determining whether such routes and rates should be established the Commission's power is limited by the prohibitory language of Section 15 (4). If the Commission should follow its usual practice in proceedings of this nature, of deferring consideration of divisions until there is first determined the jurisdictional question of whether joint through rates shall be established (see *San Francisco & Napa Valley R. R. v. So. Pac. R. Co.*, 259 I. C. C. 319, 320), it would have an opportunity to give adequate consideration in an orderly manner to the separate criteria established by Congress. That is, it would first determine the issue of through routes and joint rates under Section 15 (3) as limited by Section 15 (4) and, at the appropriate time, it would determine the issue as to divisions under Section 15 (6).

3. The legislative history of Section 15 (4) indicates that the prohibitory language was intended to be applied to Commission orders other than those merely involving short-hauling, and such history supports the District Court's direct application of its terms.

C. The fact that no traffic affected by the Commission's order will be diverted to an alternate route does not render inoperative the prohibition in Section 15 (4) against estab-

lishing through routes and joint rates for the purpose of assisting a carrier financially. The route over which the traffic affected is required by the order to move is now open only at lawful combination rates. No statute other than Section 15 (3) permits the prescription of joint through rates for application over routes open only at combination rates. See *Western Pacific v. Northwestern Pacific R. Co.*, 191 I. C. C. 127, at 130, where it was said:

> "Connecting routes do not necessarily constitute through routes over which carriers may be forced to establish joint rates."

and *Penn. R. R. v. U. S.*, 323 U. S. 588, where this Court said at page 590:

> "The Commission's authority to grant relief is bottomed on Sections 15 (3) and (4)."

Broad as may be the power to require through routes and joint rates upon a finding of public necessity or desirability under Section 15 (3), just as broad is the absolute prohibition against exercise of that power where its purpose is financial assistance to a carrier which would participate therein. Since the Commission attempted to act under Section 15 (3) to accomplish a purpose forbidden by Section 15 (4), its order was unlawful.

D. The conclusion reached by the District Court (paragraph A, *supra*) was manifestly correct.

II.

The District Court correctly held the Commission's order fixing divisions void because not supported by findings of

the basic or jurisdictional facts upon which its exercise of the power to prescribe divisions is expressly conditioned. *Beaumont, S. L. & W. Ry. Co. v. United States*, 282 U. S. 74, 82.

III.

The District Court correctly held that the Commission's order was not sustained by the evidence. None of the factors which appear to have entered into the Commission's decision supports its determination of either the issue of joint through rates or of divisions.

One of the factors accorded substantial weight in the prescription of divisions was the relationship between the level of the existing proportional rates and the so-called Appendix-10 scale of class rates. This scale was conceived in an unrelated proceeding for the establishment of rates on class-rated traffic moving east of the Montana-Dakota state line. It was borrowed therefrom for use as a standard in this case without notice to the parties. It could not properly have entered into the Commission's determination of any issue without evidence in the record, which was wholly absent, that conditions attending the transportation of Montana Western grain were comparable with those attending the movement of class-rated traffic in the east.

In the prescription of divisions Section 15 (6) affirmatively requires the Commission to consider "the amount of revenue required to pay*** [the] respective operating expenses, taxes and a fair return on *** [the] railway property held for and used in the service of transportation" by the carriers affected. The Commission considered these matters as to Montana Western but not as to Great Northern. Section 15 (6) does not empower the Commission to prescribe divi-

sions upon consideration of the financial necessities of but one of the participants in joint through rates. *Brimstone R. R. Co. v. U. S.*, 276 U. S. 104; *U. S. v. Abilene & Southern Ry. Co.*, 265 U. S. 274.

IV.

The Commission's forced consolidation of the joint through rates issue under Sections 15 (3) and 15 (4) and the separate issue as to divisions under Section 15 (6) brought together on one record for a common determination issues which the statutes require to be determined separately. The confusion was aggravated by incorporation into the record over objection of the Great Northern (R. 433-434) of voluminous testimony from the abandonment case, to which Great Northern was not a party, taken at a hearing at which it was not represented. In addition, the assumption *de hors* the record even as so enlarged, that class-rated traffic in the east moved under conditions comparable with Montana Western grain so as to permit the respective proportional rates of the Montana Western and Great Northern to be tested by the borrowed Appendix-10 scale, was manifestly improper. This procedure deprived Great Northern of the "full hearing" prescribed by Sections 15 (3) and 15 (6) and was violative of the due process guaranty of the Fifth Amendment to the Constitution. *U. S. v. Abilene & Southern Ry. Co., supra.*

V.

Compliance with the holding of the District Court will aid, rather than hinder, the Commission in performing the duties imposed by Congress.

ARGUMENT

I.

Establishment of Joint Through Rates — District Court Rightly Held That Commission Exceeded its Statutory Powers in Prescribing Joint Through Rates on Same Level as Existing, Lawful Combinations Solely as a Foundation for Fixing Divisions to Assist Montana Western in Meeting its Financial Needs.

A. Court Below Held the Order Invalid as Outside the Authority Granted by Section 15 (3) of the Interstate Commerce Act as Limited By Section 15 (4).

The Commission's powers are limited to those delegated by Congress and may be exercised only as the statutes direct. *U. S. v. Carolina Carrier Corp.*, 315 U. S. 475, 489. Only two provisions of the Interstate Commerce Act authorize the Commission to prescribe joint rates: Sections 15 (1) and 15 (3). The authority to order a new rate under Section 15 (1), whether such rate be individual or joint, is conditioned upon a finding that the existing rate is unreasonable or otherwise unlawful. See *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, and *Interstate Commerce Commission v. L. & N. R. Co.*, 227 U. S. 88, where it was said at page 92:

> "Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. *The Commission's right to act depends upon the existence of this fact*, * * * ." (Emphasis supplied.)

In the present case the Commission made no finding that any existing rate was unreasonable or unlawful. There has been and could be no attempt to justify under Section 15 (1) the order prescribing joint through rates on the same level as existing combinations. It was, however, sought to be justified in the court below, and is sought to be justified here, under the terms of Section 15 (3).

Section 15 (3) authorizes the Commission to prescribe "through routes * * * and joint rates" when it finds them "to be necessary or desirable in the public interest." But Section 15 (4) provides in part:

> "No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

With respect to these two subdivisions of Section 15, this Court said in *United States v. Missouri Pac. R. Co.*, 278 U. S. 269, at pages 276-277:

> "The general language of paragraph (3) is limited by paragraph (4)."

The Commission's finding that "it is necessary and desirable in the public interest that joint through rates be established" between Montana Western and Great Northern points (R. 24) and the circumstance that the single purpose of its order was to assist the Montana Western in meeting its financial needs squarely presented to the trial court the question whether the Commission's prescription of the joint through rates contravened Section 15 (4). The District Court's affirmative answer was:

> "Resolving every presumption in favor and support of the order of the Commission, we cannot avoid con-

cluding that prescribing joint through rates on the same level as existing lawful combinations, but with divisions which are unduly favorable to the Montana Western and clearly unfair to the Great Northern, is but a means to the end of assisting Montana Western to meet obvious financial needs. This is expressly prohibited by law." (R. 594.)

The Court quoted, in that connection, the specific prohibition in Section 15 (4).

B. The Prohibition in Section 15 (4) Against Establishment of a Through Route and Joint Rates to Assist a Carrier Financially, is not Confined to Situations Where Such Establishment Would Cause Short Hauling.

1. *The Plain Language of the Statute in its Context Forbids. Emasculation by Construction.*

Appellants, though recognizing that the portion of Section 15 (4) prohibiting the Commission from establishing a through route and joint rates applicable thereto for the purpose of assisting a carrier to meet its financial needs must be given effect, nevertheless urge that the prohibition is a qualified one. They regard it as a limitation on the Commission's power only where its prescription of through routes and joint rates would require short-hauling (Brief for the United States and I. C. C., p. 27). They say as to Section 15 (4): "The entire thrust of this provision is that a carrier can only be compelled to short-haul itself * * * in certain stated circumstances." (*id.*)

Only the first sentence of Section 15 (4), however, relates to short-hauling. After the first part of that sentence prohibiting the short-hauling of a railroad (a) unless inclusion

of its lines would make the existing routes unreasonably long, that section proceeds:

> " * * * or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. *No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs.** In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest." (*Emphasis supplied.)

It is to be noted that the language in the quotation which we have above italicized; prohibiting establishment of through routes and joint rates to assist a carrier financially is absolute. It stands by itself in a separate, independent sentence. If Congress had intended, as appellants contend, to subordinate to the short-haul clause the prohibition against the Commission's prescription of through routes and joint rates for purposes of assisting a carrier financially, it could easily have done so by the simple expedient of adding to the first

sentence a clause making such prohibition applicable only to cases involving short-hauling. It is reasonable to conclude that if it had so intended, then it would have written the prohibition in that manner. This it did not do. The third and last sentence of Section 15 (4) merely enlarges the power to order through routes and joint rates, in cases of emergency and for temporary application, dispensing with the necessity of notice, hearing and report in such emergency cases. It has no significance in this case.

If the Commission, in prescribing over rail lines through routes and joint rates short-hauling carriers, should consistently abide by the limitations set forth in clauses (a) and (b) of the first sentence of Section 15 (4) and should prescribe such through routes and joint rates only in the situations covered in such clauses, then there would be no occasion for the Commission to heed, also, in cases where short-hauling would result, the limitation of the second sentence against establishing a through route and joint rates for the purpose of assisting a carrier to meet its financial needs. To put it in another way: if the Commission, in prescribing through routes and joint rates between Washington and Chicago, for example (see Brief of U. S. and I. C. C., p. 32), should require short-hauling, and should nonetheless abide by the first sentence of Section 15 (4) as the law requires it to do, then the purpose of its order would be either (a) to create a shorter route where the existing route is unreasonably long, or (b) to provide adequate, more efficient or economic transportation, and the Commission's prescription would not be "for the purpose of assisting any carrier * * * to meet its financial needs." The second sentence, then, if restricted to apply only to cases where there are prescribed through routes and joint rates over rail lines re-

sulting in short-hauling, as appellants suggest, would serve no purpose. But on the other hand, observance of the statute as it is written, applying the limitation of the second sentence to every through route and joint rate sought to be established by the Commission, *whether short hauling would thereby be required or not*, would give it definite force and meaning. Not all through routes and joint rates short-haul one or more of the participants. The through route and joint rate here involved do not have that effect.

In this situation the context in which the second sentence of Section 15 (4) appears compels enforcement of its terms as written, and the District Court so enforced it. We show presently that, appellants' contentions to the contrary notwithstanding, enforcement of the statute in this manner does not conflict with other provisions of the Interstate Commerce Act. We also show that the statute's legislative history, including what was said at hearings of Congressional sub-committees, if resort must be had to such history, as appellants also suggest, does not indicate that the unambiguous statutory language be restricted by construction but rather supports the trial court's direct application of the plain statutory words. Before discussing these "aids to construction," upon which appellants rely, we call the Court's attention to the following quotation, particularly apropos and involving the Commission's construction of Section 15 (4) before it was amended in 1940, from *United States v. Missouri Pacific R. Co.*, 278 U. S. 269, at pages 277-278:

* * *

> "The language * * * [of the statute] is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are

therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority in respect of the establishment of through routes. Construction may not be substituted for legislation. *United States v. Wiltberger*, 5 Wheat. 76, 95-96. *United States v. Fisher*, 2 Cranch 358, 386. *Lake County v. Rollins*, 130 U. S. 662, 670. *Caminetti v. United States*, 242 U. S. 470. *Ex parte Public National Bank*, ante, p. 101. *United States v. Colorado & N.W.R. Co.*, 157 Fed. 321, 327.

"Appellants seek to support the view for which they contend by some of the legislative history of the enactment and especially by explanatory statements made by Senator Elkins in connection with the report of the majority of the Senate committee submitting the bill for the Act in question. Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent. But where the language of the enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed. *United States v. Freight Ass'n*, 166 U. S. 290, 325. *Pennsylvania R.R. v. International Coal Co.*, 230 U. S. 184, 199. *Mackenzie v. Hare*, 239 U. S. 299, 308. *Caminetti v. United States*, *supra*, 490."

2. The Prohibitory Language of Section 15 (4) Does Not Conflict With Other Subparagraphs of Section 15, or with the National Transportation Policy, or with the Commission's Obligation in a Divisions Case, to Consider the Financial Necessities of Weak Lines.

Appellants urge that the District Court's application, in this case, of the prohibition in Section 15 (4) against establishment of a through route and joint rates to assist a carrier financially is out of harmony with Section 15 (3), insofar as that section refers to divisions, and with Section 15(6), requiring the Commission to consider the financial needs of the participants in joint rates in any proceeding to establish divisions; and that such application of Section 15 (4) by the Court below is also in conflict with the National Transportation Policy. They argue that a construction of the prohibitory language limiting it so as to apply only to orders requiring short-hauling is indicated by a number of decisions of this Court and of the Commission construing Section 15 and upholding, in litigation over divisions, "the Commission's authority to consider the financial needs of a weak road and to give it a portion of a joint rate larger than the share to which it would otherwise be entitled, in order to maintain it in effective operation as part of an adequate transportation system." (Brief of U. S. and I. C. C., pp. 29, 27-31, 40, 45-47.)

The argument is unsound. The conflict which appellants assert they see between the prohibition in Section 15 (4), which applies to through routes and joint rates, and the provisions of Section 15 (6), requiring financial needs to be considered *in a divisions case*, would not be eliminated by a construction merely limiting the application of the prohibition to *some* through routes and joint rates—that is, to those

requiring short-hauling. Were the prohibition in Section 15 (4) to be applied *in any case*, it would still, according to such logic, conflict with Section 15 (6), requiring finances to be considered in a divisions case. Such conflict, if it exists for the reasons advanced by appellants, may be removed only if the prohibition in Section 15 (4) is construed so as not to apply in any situation whatever. This would violate elementary principles of statutory construction.

Moreover, the decisions cited by appellants in support of the argument that financial needs may be considered in a joint through rate case are not in point. None of the cases cited were joint through rate cases. All of them[12] involved, exclusively, Commission orders, made under Section 15 (6), prescribing divisions of joint rates already existing. Appellee has no quarrel with the well-settled principle that in a proceeding brought for the prescription of divisions of existing joint rates the Commission may consider the financial necessities of weak roads and prescribe new divisions responsive to the entire record, including such financial needs. The instant proceeding is not, however, such a case. One reason the Court below struck down the Commission's order was because the Commission prescribed joint through rates for the purpose of assisting a carrier financially, which is forbidden by Section 15 (4), a statute which relates to through routes and joint rates and not to divisions. When the Commission's order was made no divisions were in existence.

A careful analysis of the claim that the District Court's application of Section 15 (4) does not harmonize with the

[12] Except *Dayton-Goose Creek Ry. Co. v. U. S.*, 263 U. S. 456, which involved the constitutionality of an order made under the formerly effective recapture provisions of the Interstate Commerce Act, 41 Stat. 456, 489-491.

other paragraphs of Section 15, above mentioned, or with certain principles announced by this Court in the divisions cases cited requires consideration of the several applicable provisions of the Interstate Commerce Act in some detail.

Section 1 (4) of the Act enjoins all carriers by rail to establish reasonable through routes with other carriers and just and reasonable rates. It provides further that—

> "*In case of joint rates,*" carriers must "establish just, reasonable, and equitable divisions thereof." (Emphasis ours.)

Section 15 (3) provides that the

> "Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates * * * and the *divisions* of such rates, fares or charges *as hereinafter provided* * * *." (Italics ours.)

Section 15 (4) provides in part, as already stated:

> " * * * No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

Section 15 (6) provides in part:

> "Whenever, after full hearing upon complaint or upon its own initiative, the commission is of opinion that the divisions of joint rates, fares, or charges, *applicable* to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial *as between the carriers parties thereto* (whether agreed upon by such carriers, or any of them, or otherwise established), the commission shall by

order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation * * *." (Emphasis supplied.)

It will be seen that the provisions of Section 15 (3) authorizing the establishment of through routes and joint rates are subject to the restrictions in Section 15 (4), and the provision of Section 15 (3) authorizing prescription of divisions is subject to the direction that such divisions shall be established "as hereinafter provided"; that is, as provided by Section 15 (6).

It is apparent, moreover, from reading Section 15 (6) that the Commission can prescribe divisions only when it is "of opinion that the divisions of joint rates, fares, or charges, *applicable* * * * are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial *as between the carriers parties thereto* (whether agreed upon by such carriers, or any of them, or otherwise established)." (Emphasis

ours.) The Commission itself has followed the practice, where a complaint seeks both joint rates and divisions, as does the complaint in this case, of deferring "consideration of the prayer for * * * divisions * * * until it shall be determined to what * * * extent joint rates shall be required to be established, and the amounts thereof." *San Francisco & N. V. R. v. Southern Pac. Co.*, 259 I. C. C. 319, 320. For similar cases see *Application of Inland Navigation Co.*, 218 I. C. C. 393; *Campbell's Creek Coal Co. v. Ann Arbor Rr. Co. et al.*, 33 I. C. C. 558; *Texas Cement Plaster Co. v. St. Louis and S. F. Rr. Co., et al.*, 26 I. C. C. 508; *Louisville Board of Trade, et al., v. Indianapolis C. & S. T. Co.* 27 I. C. C. 499. That is because Section 15 (6), which in terms requires findings relating to the "applicable" divisions before new divisions may be fixed, cannot operate if joint rates and divisions are prescribed simultaneously. In *Beaumont, S. L. & W. Ry. v. U. S.*, 282 U. S. 74, cited by the trial court in its opinion (R. 593), this Court said at p. 82:

> "The Commission may not change an existing division unless it finds that division unjust or unreasonable. *Brimstone R. R. Co. v. United States*, 276 U. S. 104, 115; Cf *Interstate Commerce Commission v. Louisville & N. R. R.*, 227 U. S. 88, 92."

See to the same effect *Baltimore & O. R. Co. v. U. S.*, 298 U. S. 349, where this Court said, with reference to prescribing divisions, at pp. 356-357:

> "Exertion of that power by the Commission is conditioned upon its finding after a full hearing that the divisions *then in force* do not, or in the future will not, comply with the specified standards." (Italics supplied.)

In *Canton R. Co. v. Ann Arbor R. Co.*, 163 I. C. C. 263, at page 265, the Commission said:

"It is plain from this provision that there must exist joint rates between the complainant and defendants as a prerequisite to the exercise of our authority to fix divisions between them." [13]

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[13] Appellants, in a footnote (Brief of U. S. and I. C. C., p. 28) cite *O'Keefe v. United States*, 240 U. S. 294, 300-302 and *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, as supporting their contention that "this court has recognized the Commission's power to prescribe a joint rate and a division in the same order." These early cases do not, however, hold that joint through rates under Section 15 (3) as limited by Section 15 (4) and divisions of such rates under Section 15 (6) may be established in the same order or simultaneously. The *O'Keefe case* involved an order of the commission (1) requiring certain trunk lines to reopen through routes and publish joint rates with tap lines, which routes and rates the Commission had theretofore ordered canceled under a misconception of law, and (2) prohibiting the trunk lines "from making to any of the tap lines an allowance or division out of the joint rates in excess of maximum amounts" which the order prescribed. The tap lines were facilities owned by shippers that transported large quantities of the shippers' own materials to junctions with trunk lines for further transportation to interstate destinations. This Court held (pp. 300-301) that the second portion of the Commission's order prescribing maximum allowances or divisions did not depend for its validity on the Commission's compliance with the portion of the Act authorizing it to prescribe just, fair and equitable divisions (the predecessor of Section 15 (6) as it now reads), but that it was rather an order fixing maximum reasonable allowances to shippers under that portion of the Act which now appears as Section 15 (13), which was designed to prevent discrimination and rebates, and which then provided in part as follows:

> "If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order * * *." (See 240 U. S. at p. 301).

The quoted language did not, like Section 15 (6), make the existence of a joint rate or of divisions of joint rates a condition to the exercise of the Commission's power to prescribe maximum allowances thereunder. The *Manufacturers Ry. Co. case* involved a similar shipper facility, owned by a brewery, but the Commission order there considered by the Court, though it prescribed reasonable maximum rates, did not prescribe maximum, or, in fact, any divisions or allowances. This Court, in the *Manufacturers Case* citing the *O'Keefe Case*, said simply, "* * * it [the Commission] might have dealt with the divisions in the same order, *so far as necessary to prevent undue favoring of the Brewery.*" (Emphasis ours.) The italicized language and the reference to the *O'Keefe case* clearly indicate that the Court was not of the view that the situation was governed by those provisions of the act authorizing a prescription of just, fair and equitable divisions now contained in Section 15 (6), but rather the provisions of the Act authorizing prescription of maximum allowances to shippers for the purpose of preventing discrimination and rebates.

The Commission did not here order the reduction to a maximum basis of any similar allowance.

Even before 1940, when the prohibitory language here involved was incorporated into Section 15 (4), this Court commented upon the wide differences between the issues in a joint through rate case and those in a divisions case. In *Baltimore & O. R. Co. v. United States, supra,* this Court said at page 357:

> "In proceedings to determine and prescribe divisions the commission is governed by §§ 1 (4), 15 (6), 15a (2); it is not required or authorized to investigate or determine whether the joint rates are reasonable or confiscatory. The question whether it complied with the requirements of the Act does not depend upon the level of the rates or the amounts of revenue to be divided. The purpose of the provisions just cited is to empower and require the commission to make divisions that colloquially may be said to be fair."

In *L. & N. R. R. v. Sloss-Sheffield Co.,* 269 U. S. 217, this Court, speaking through Mr. Justice Brandeis, said (p. 234):

> "The division of the joint rate among the participating carriers is a matter which in no way concerns the shipper. The shipper's only interest is that the joint rate be reasonable as a whole. It may be unreasonable although each of the factors of which it is constructed was reasonable. It may be reasonable although some of the factors, or of the divisions of the participants, were unreasonable."

And subsequent to 1940, the Commission has said (*Hougland & Hardy, Inc., v. Ahnapee & W. Ry. Co.,* 255 I. C. C. 617, 626):

> "Divisions * * * have no bearing upon complainant's right to have its traffic carried at reasonable through rates."

and, conversely, that (*Cancellation of Rates and Routes via Short Lines*, 245 I. C. C. 183, 185):

> "* * * dissatisfaction with divisions does not constitute justification for cancellation of joint rates."

The foregoing makes plain the fact that no conflict between the prohibitory language of Section 15 (4), relating to joint through rates, and the provisions of Sections 15 (3) and 15 (6) in respect to divisions will occur if joint rates and divisions are not attempted to be determined simultaneously "on a common record". The *New England Divisions Case*, 261 U. S. 184, and the other cases of similar tenor heavily relied on by appellants merely upheld Commission orders, made solely under Section 15 (6), prescribing divisions of existing joint rates which had theretofore been agreed upon or lawfully established under other subparagraphs of Section 15.

Sections 15(4) and 15(6) must be applied in *pari materia*. Section 15 (6), which relates only to the prescription of divisions of existing joint through rates, should not be applied so as to defeat operation of the specific terms of Section 15 (4) which contains limitations on the establishment of joint through rates but does not govern prescription of divisions. If the Commission follows its customary procedure and considers the determination of divisions only after the condition precedent to a divisions case arises, that is, only after joint through rates are established and there exist joint revenues to be divided, then there can be no occasion to force a "construction" or limitation of any language in Section 15 (4).

The alleged conflict between the pertinent portion of Section 15 (4) and the general language of the National Trans-

portation policy hardly needs discussion. In the first place, strict observance of the quoted prohibition in Section 15 (4), which is what the District Court compelled, is at least as consistent, if not more consistent, with the Commission's duty of "developing, co-ordinating and preserving a national transportation system," as the National Transportation Policy provides, as would be the opposite course of requiring joint through rates at the expense of one carrier to bring about continued existence of another carrier "withering on the vine of its initial usefulness." [14] In the second place, it is elementary that the general language of the National Transportation Policy should not be construed to modify or change any of the explicit and detailed provisions of the Act to which it relates. Cf. *Ann Arbor v. United States*, 281 U. S. 658; *Cotton from Memphis and Helena to New Orleans*, 273 I. C. C. 337, 367.

3. *The Statute's Legislative History, if Resort Thereto Be Made, as Appellants Suggest, Confirms, Rather than Refutes, the District Court's Direct Application of its Terms.*

The language in Section 15 (4) prohibiting establishment of through routes and joint rates to assist a carrier financially, was incorporated into that section on September 18, 1940, as a part of the general amendment to the Interstate Commerce Act passed in that year and known as the Trans-

[14] In the opinion of the District Court it is said (R. 594): "*** it seems obvious that the twenty miles of delapidated trackage and equipment used by the insolvent Montana Western (constituting 1.9 per cent of the 1050-mile joint haul to Minneapolis) is withering on the vine of its initial usefulness, and in the face of progress in and adequacy of transportation by motor vehicle over a system of public highways now serving the area. The record of the instant case makes manifest that, except for liberal transfusions of financial aid during the past twenty-five years by the Great Northern, the Montana Western would long since have been dead on its wheels."

portation Act of 1940. So far as we have found, the quoted language has never been construed by any court.

Prior to the 1940 amendment the Commission's authority to establish through routes and joint rates in the public interest (except temporary through routes to relieve car shortages and other emergencies) was subject to the limitation that "except as provided in Section 3 [relating to instances of preference and prejudice] and except where one of the carriers is a water line" the Commission could not "require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad * * * which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long." In *United States v. Missouri Pacific R. Co.*, 278 U. S. 269, at 276, the Court said with respect to this statute as it then provided:

> "The Act does not give the Commission authority to establish all the through routes it may deem necessary or desirable in the public interest. The general language of paragraph (3) is limited by paragraph (4). The latter lays down the rule that, subject to specified exceptions, a carrier may not be compelled to participate in a through route which does not include substantially its entire line lying between the termini of the route. The purpose is to protect the long haul routes of carriers."

Prior to 1940 the Commission had been of the view that it could consider the financial needs of railroads in determining whether there existed the public necessity or desirability which was made prerequisite to an order establishing through routes and joint rates under Section 15 (3). In *Fort Smith, S & R. I. R. R. Co. v. A. & V. Ry. Co.*, 107 I. C. C. 523 (decided March 2, 1926) it quoted from a Su-

preme Court decision, *U. S. v. Abilene & So. Ry. Co.*, 265 U. S. 274, 284, having to do with divisions rather than the establishment of through routes and joint rates, wherein the Supreme Court said that the Commission in fixing divisions could "take into consideration the financial needs of a weaker road," and the Commission said in regard thereto (at p. 525):

> "Similar considerations may properly govern our action in establishing through routes, and we have frequently taken them into account in previous cases of this nature, *Routing via Midland Continental R. R.*, 78 I. C. C. 328; *Routing via Salt Lake & Utah R. R.*, 95 I. C. C. 237; *C. M. & St. P. Ry. Co. v. U. P. R. R. Co.*, 88 I. C. C. 312."

Though the Court on other grounds set aside the Commission's order in the *Fort Smith, S. & R. I. RR.* case (see *U. S. v. Mo. Pac. R. Co., supra*) and though a dissenting Commissioner in that decision stated that

> "Robbing Peter to pay Paul has never been held to be either sound finance or compatible with the public interest," (107 I. C. C. 526)

the Commission persisted in its view that the financial needs of weaker roads could be considered in determining public necessity and desirability for through routes and joint rates. *Restrictions in Routing over S. L. & U. R. R.*, 122 I. C. C. 208, 211.

Even if financial considerations could, before 1940, be permitted to enter into the Commission's determination of public necessity and desirability for through routes and joint rates under Section 15 (3), the Commission was still without power, before the 1940 amendment, however, as held

in *United States v. Missouri Pac., supra,* to compel a railroad to short-haul itself, even in the public interest, except in one situation: that was where the existing routes of the railroad to be short-hauled were unreasonably long. Chafing under this limitation, the Commission in its fifty-first annual report to Congress—1937, said at page 106:

> "7. We recommend that section 15 (4) of part I of the Interstate Commerce Act be amended so as to enable us to establish through railroad routes where deemed necessary in the public interest regardless of the 'short hauling' of any carrier."

This recommendation was repeated in the Commission's report to Congress—1938, at p. 122.

The 1940 amendment to Section 15 (4) changed that section in several respects. It added after the language prohibiting the short hauling of a railroad (a) unless inclusion of its lines would make the existing through routes unreasonably long, this language:

> "or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. *No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs.*" (Emphasis supplied.)

Following these words was the provision relating to emergency routing to which we have already referred. As we mentioned earlier, it may be noted that the provision we have italicized which contains the prohibition against establishing a through route and joint rates to assist a needy carrier is absolute and contained in a separate, independent sentence.

In explaining the 1940 amendment finally agreed upon by the House and Senate, the Conference Report, No. 2832, 76th Congress, 3d Session, to accompany S. 2009, states at pages 70-71:

> "The House amendment made no change in the short-haul provisions of section 15 (4) and the exceptions thereto. The conference substitute in section 10 (b) retains them and includes another exception by providing that the restriction against short hauling a rail carrier shall not apply where the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic transportation. The Commission in the exercise of this additional authority is directed to give reasonable preference in any particular case to the carrier by railroad which originates the traffic, so far as is consistent with the public interest and subject to the limitations with respect to unreasonably long routes and the necessity of providing adequate and more efficient or more economic transportation. *The Commission is prohibited from establishing any through route and joint rates applicable thereto for the purpose of assisting any carrier that would participate therein to meet its financial needs.*" (Italics ours.)

The same explanation was made by Senator Wheeler on the Senate floor. Congressional Record, September 9, 1940, page 17850.

The 1940 amendment to Section 15 (4), the result of a compromise between the House and Senate, permitted the Commission to compel through routes and joint rates in one situation where it could not previously exercise that power—where such through routes and joint rates were found needed to provide adequate, and more efficient or more economic transportation. However, the separate mandate prohibiting the Commission from compelling through routes and joint rates for the purpose of assisting a carrier to meet its financial needs, also incorporated in the amendment, is conclusive that Congress was also determined to curb the establishment of through routes and joint rates, under Commission order, as such orders had been made in previous cases, for the purpose of "robbing Peter to pay Paul."[15]

[15] Appellants refer to certain testimony at Congressional subcommittee hearings as supporting their view that the prohibitory language in Section 15 (4) should be construed to apply only where the Commission prescribes through routes and joint rates which short-haul a carrier. The testimony referred to was given in the spring of 1939 at subcommittee hearings involving bills considered at the first session of the 76th Congress which, if enacted, would have removed all restrictions on the Commission's power, after hearing, to prescribe through routes and joint rates in the public interest. It was not given in connection with any bill containing the prohibitory language in the second sentence of Section 15 (4), which is the language this Court is here asked to construe. The prohibition in Section 15 (4), as it now reads, first was brought to the attention of Congress in Conference Report No. 2832 to accompany S. 2009, which is quoted *supra*, page 45, and is dated August 7, 1940. S. 2009, so amended in conference, passed the second session of the 76th Congress, and was enacted September 18, 1940. The testimony at hearings given a year before in connection with H. R. 3400 and S. 1085, which is relied upon by appellants (Brief of U. S. and I. C. C. pp. 33-39) covered a wide range. Such testimony was not, as appellants state (*Idem.*, p. 35), "focused exclusively upon the short-hauling problem." For example, officials of the American Short Line Railroad Association, who appeared in support of these earlier bills, stated that the interest of their member lines in participating in through routes and joint rates was not confined to situations where such lines would participate as intermediate or "bridge" carriers. It was stated that 50 percent of the short line membership, comprised of "feeder lines", was likewise interested in this legislation. (See testimony of C. A. Miller, General Counsel of the American Short Line Association, at hearings before a subcommittee of the Committee on Interstate Commerce, United States Senate, 76th Congress, First Session, on S. 1085,

C. Fact that Traffic Affected by Commission's Order Will Not Be Diverted to an Alternate Route Does Not Render Inoperative Prohibition in Section 15 (4).

The order in this case required Great Northern and Montana Western "to cease and desist * * * and thereafter to abstain from applying combinations of proportional rates for the interstate transportation of grain, in carloads, from points on the line of the Montana Western Railway Company to points on the line of the Great Northern Railway Company" and "to establish and thereafter to maintain and apply" to such transportation "joint rates which shall not exceed the present combinations of proportional rates to and from Conrad, Montana." The order was to "continue in force until the further order of the Commission." (R. 25.)

This order may not be complied with by increasing the Montana Western's existing separately established rates to Conrad and reducing the Great Northern's rates from Conrad in the same amount. Such action would violate the order. It may be complied with only by the publication of joint through rates over the route now open only at combination rates. Joint through rates have a significance legally which is different from combinations of locals or proportionals. Their establishment affects substantially the

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and statement of J. M. Hood, *id.*, pp. 83-84.) Mr. J. M. Hood, president of the American Short Line Railroad Association, stated in part:

> "That question of whether or not investments are justified on branch lines is equally applicable to the question of whether or not the investments are justified on short lines. In other words thousands of trunk line branches and the five hundred short-line railroads in the United States are in exactly the same position, so far as the people who proposed them and built them are concerned. I do not think the public owes any particular duty to either one of them, as a matter of cold fact. If they were built with good judgment, in a territory which needed the service, why, they are entitled to live, and they will live. If they were built in bad judgment and are due to dry up, I do not feel that the public is under any compulsion to support them—whether they be branch lines or short lines or whatever."

rights and liabilities of the respective participants.[16] The Commission's order here not only requires the Great Northern to forego existing charges which it established individually and which are not found unreasonable or otherwise unlawful, but it also requires it to become a joint participant with an insolvent in a joint transportation service from beyond its terminus, to which it is not now committed jointly but only upon its own lawful terms. The significance of the order prescribing joint rates over a route now open only at combination rates appears when it is seen that under the new allocation of the revenues which are to be derived therefrom the Commission has ordered that the insolvent carrier is to be benefited solely at Great Northern's expense. And if the Commission may require such joint participation for the purpose of assisting the Montana Western in meeting financial hardships at a cost to Great Northern of \$58,000 or so annually, there would appear to be no limitation on the Commission's power, once joint rates are established, to require, in the Commission's discretion, in the event Montana Western's distress should not be alleviated thereby, still greater contributions.

Except in proceedings under Section 15 (1), where the Commission finds an existing joint rate unreasonable or

[16] In *L. & N. R. R. v. Sloss-Sheffield Co.*, 269 U. S. 217, at pages 233-234, Mr. Justice Brandeis stated with respect to certain unlawful joint rates, the enforcement of which resulted in injury:

"The fact that the joint rate had been constructed out of existing proportional rates is not of legal significance. The rates complained of were not merely the aggregate of individual local or proportional rates customarily charged by the respective lines for the transportation included in the through routes. The rates in question were strictly joint through rates. Each through rate was complained of as a unit. Compare *Parsons v. Chicago & Northwestern Ry. Co.*, 167 U. S. 447, 455-6. A single charge was made for the transportation from point of origin to point of destination.

"* * * Every carrier who participates in the infliction of this wrong is liable *in solido* like every other joint tort feasor. * * * The Louisville & Nashville, the initial carrier, exacted the excessive joint rates on behalf of itself and of all of the connecting carriers who with it were parties to the joint through rates."

otherwise unlawful and prescribes "what will be the just and reasonable * * * joint rate * * * thereafter to be observed," the prescription of joint rates is authorized only under Section 15 (3) as that section is limited by 15 (4). In other words, Congress has considered the matter of ordering joint through rates for application over routes where joint rates have not theretofore existed of sufficient importance to require the Commission, upon their establishment, to make a special finding that they are necessary and desirable in the public interest under Section 15 (3) and to require also that the limitations set forth in Section 15 (4) be observed.

The Commission in its report in the instant proceeding found "it is necessary and desirable in the public interest that joint through rates be established for the interstate transportation of grain, in carloads, from points on the Montana Western to points on the Great Northern." (R. 24.) The Commission, in making the quoted finding, rightly conceived that it was proceeding under the standards fixed by Section 15 (3) even though there already existed a through route *at combination rates* between the points involved.

In practice there are through routes *at combination rates* between all points served by railroad throughout the country via all railroad junctions through which carload traffic can be interchanged.[17] In view of these circumstances, if Section

[17] It was said in *St. Louis S. W. Ry. Co. v. United States*, 245 U. S. 136 at page 139, footnote 2:

"A 'through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a 'through rate'. This 'through rate' is not necessarily a 'joint rate'. It may be merely an aggregation of separate rates fixed independently by the several carriers forming the 'through route'; as where the 'through rate' is 'the sum of the locals' on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation. *Through Routes and Through Rates*, 12 I. C. C. 163, 166. Ordinarily 'through rates' lower than 'the

15 (3) does not operate to delineate the Commission's powers when it seeks to establish joint through rates over routes open at combination rates, that section cannot operate in any situation where joint through railroad rates are sought to be established over routes via established junction points. The Commission was right, therefore, in framing its finding as to public interest under the specific terms of Section 15 (3). However, in concluding that its authority under Section 15 (3) was not limited by Section 15 (4), it committed a serious error of law. *United States v. Missouri Pacific R. Co.*, 278 U.S. 269, at pages 276-277, where it was said:

> "The general language of paragraph (3) is limited by paragraph (4)."

Any construction of either paragraph which would provide for its non-application in situations where through routes are already open *at combination rates* would render these paragraphs completely nugatory. To illustrate: There are six separate railroads having individual single line routes

sum of the locals' are 'joint rates.' Prior to the amendment of the Act to Regulate Commerce (1906, c. 3591, Sec. 4, 34 Stat. 584, 590) authorizing the Commission to establish through routes and joint rates, all 'joint rates' were (as most still are) the result of agreements between carriers, which fix also the 'divisions'; that is, the share of the 'joint rate' to be received by each. *New York, New Haven & Hartford R. R. Co. v. Platt*, 7 I. C. C. 323, 329."

In *Louisville and Nashville R. Co. v. Behlmer*, 175 U. S. 648, it was held that a through route has been established wherever a common carrier accepts and transports interstate traffic under a through bill of lading, though it charges its full local rates for the service performed.

Section 6 (1) of the Interstate Commerce Act has long provided that over lines between points on different railroads with respect to which no joint through rates have been established "the separately established rates" of the individual carriers shall be applied to the through transportation. *United States v. Wood*, 145 Fed. 405; *Missouri Pac. R. Co. v. Rea-Patterson Milling Co.*, 273 Fed. 518; *Davis v. Kelly-Weber & Co.*, 24 Fed. (2d) 708.

This means, as the Commission stated in *Western Pacific Ry. Co. v. Northwestern Pac. R. Co.*, 191 I. C. C. 127, 130, quoted in the text, *infra*, that "through rates exist between all points throughout the country * * * wherever physical rail connections are available," but, of course, except where joint rates are in effect, these are through routes by combination.

between Chicago and St. Louis. These are the Chicago and Eastern Illinois, the New York Central, the Illinois Central, the Wabash, the Gulf, Mobile & Ohio, and the Chicago, Burlington & Quincy. Each line publishes its own single factor rate between these points. It also publishes rates to and from numerous intermediate junctions. There are innumerable through routes *by combination* between Chicago and St. Louis via said junctions. If Sections 15 (3) and 15 (4) did not govern the Commission's power to prescribe joint through rates over routes open only at combinations, the Commission would have authority in its discretion, without making a finding of public interest under Section 15 (3) and in disregard of the restrictions in Section 15 (4), to order for the transportation of property from Chicago to St. Louis a joint through rate to be participated in by all six railroads to apply, for example, over a six-line route comprised of the Chicago & Eastern Illinois from Chicago to Momence, Illinois; the New York Central from Momence to Kankakee, Illinois; the Illinois Central from Kankakee to Decatur, Illinois; the Wabash from Decatur to Springfield, Illinois; the Gulf, Mobile & Ohio from Springfield to Alton, Illinois; and the Chicago, Burlington & Quincy from Alton to St. Louis, Missouri. This route no doubt involves wasteful and expensive terminal services at the numerous interchange points and if established would result in costly car delays and wasteful transportation. Sections 15 (3) and 15 (4), if effective, prevent the Commission from prescribing joint rates over such an incongruous route, even though it is open at combination rates, where no public interest would thereby be served, or where the individual single factor rates between Chicago and St. Louis of the various lines which accord these carriers their maximum hauls are not

unduly circuitous and the proposed route is not needed for adequate, more efficient or more economic transportation. Unless Sections 15 (3) and 15 (4) do apply in such a situation, it is obvious that the Commission's authority to require joint through rates is a completely unrestricted one.

The Commission and the courts have consistently followed the only construction of Sections 15 (3) and 15 (4) which gives them meaning—a construction which is well understood by Congress—that whenever joint rates are ordered established to take the place of combinations, regardless of the fact that a through route exists at combination rates, such joint rates can be created only in strict conformity with the authorization in Section 15 (3) subject to the limitations in Section 15 (4). In *Western Pacific v. Northwestern Pacific R. Co.,* 191 I. C. C. 127, the Western Pacific contended for a different construction, its argument being stated by the Commission as follows (p. 130):

> "Complainant takes the position that the through route over its line already exists and as it is asking solely for the establishment of joint rates, the limitation on our power to establish through routes is inoperative."

The Commission there recognized the existence of through routes by combination, stating:

> "A through route is an arrangement, express or implied, between connecting railroads for continuous carriage from a point on the line of one to a destination on the line of another. A joint rate is not essential. The through rate may as well be a combination of locals or proportionals. *St. Louis S. W. Ry. Co. v. United States,* 245 U. S. 136, 139, note 2; *Virginian Ry. Co. v. United States,* 272 U. S. 658, 666; and *Grain and Grain Products,* 129 I. C. C. 261."

However, rejecting the contention that the existence of a through route by combination removed all restrictions on its power to fix joint rates, the Commission said at pages 130-131:

> "Should complainant's theory be followed to its logical conclusion, through routes exist between all points throughout the country over all railroads wherever physical rail connections are available * * *. *Connecting routes do not necessarily constitute through routes over which carriers may be forced to establish joint rates. The rights of connecting carriers afforded by the Act must be safeguarded, and in addition the necessity and desirability for the establishment of such through routes must be in the public interest.*" (Emphasis supplied.)

Because in numerous cases the Commission, in considering whether it could order joint through rates in lieu of combinations, has often used the statutory nomenclature and has stated that it was considering the ordering of "through routes * * * and joint rates" or simply "through routes" and has not always expressly said that joint through rates only were involved, it has not appeared in many cases that the problem before the Commission was, like the problem here, whether the Commission should establish joint through rates over routes available at combinations. It does so appear in *Western Pacific v. Northwestern Pacific R. Co., supra*, but only because the Commission was there obliged to make the issue clear in passing upon the contentions of the parties. However, the identical situation has been involved in practically all cases where the Commission has had to construe and apply Sections 15 (3) and 15 (4) and in practically all of the Commission cases which have come before the Supreme Court. In fact the identical

situation has *had* to apply because of the universal prevalence of through routes by combination. We know of no case in which that situation has not existed.

There are a few decisions, in addition to *Western Pacific v. Northwestern Pacific R. Co., supra,* which also indicate affirmatively that the Commission and the courts have consistently construed Sections 15 (3) and 15 (4) as governing in situations like this one where the establishment of joint rates over routes open at combination rates was being considered. In *Interstate Commerce Commission v. Columbus & Greenville Ry. Co.,* 319 U. S. 551, at p. 555, the Supreme Court, speaking simply of joint rates said:

> "Disregard of the statutory requirements for the establishment of joint tariffs may have important substantive consequences. The Interstate Commerce Act contemplates that joint railroad rates shall be established only by concurrence of the participating carriers or by the Commission in proceedings under Section 15[13] [citing under footnote 13 "Section 15 (3), 49 U. S. C. 15 (3)"]. In the exercise of its power under Section 15 to fix joint rates without the concurrence of the participating carriers, the Commission is required by Section 15 (4) to protect, in stated circumstances, the long hauls of participating carriers, and to give reasonable preference to originating carriers."

San Francisco & Napa Valley Rr. v. Southern Pac. R. Co., 259 I. C. C. 319, a case in some respects like this one, was one where joint rates in lieu of combinations were sought on traffic between points on the complainant railroad, located wholly within California, and destinations outside the state. Complainant's only railroad connection was with the Southern Pacific. Tariff rates on interstate traffic to

and from points on complainant's line were "made by the addition of complainant's local interstate rate of 5 cents per 100 pounds on all commodities," to the rates of the Southern Pacific from complainant's junction to the destinations involved or by the addition of such rate of 5 cents to the rates from the origins involved to complainant's junction with the Southern Pacific. In other words, there were through routes at combination rates. In denying complainant relief the Commission said at page 326:

> "The complaint includes a prayer for the establishment of joint rates and divisions. Since the present rates are not shown to be unlawful, no basis is provided for requiring the establishment of lower joint rates, and no sufficient reason appears for replacing the present combination rates with joint rates no lower. In any event, in view of the character of the service here considered, and the facts and circumstances surrounding the institution and maintenance of that service, we are of opinion that *the establishment of joint rates is not shown to be necessary or desirable in the public interest.* The prayer for joint rates is denied." (Emphasis supplied.)

In *Chicago & N. W. Ry. Co. v. Ann Arbor R. Co.,* 263 I. C. C. 287, at page 294, the Commission said:

> "Complainant's proposal, the establishment of joint rates, could be accepted only upon a showing of facts from which such action were deemed *necessary or desirable in the public interest.*" (Emphasis ours.)

The Commission's use of the language which we have italicized in the foregoing quotations indicates the Commission's view that its powers therein involved were circumscribed by Section 15 (3), subject, of course, to Section 15 (4).

Among other recent cases holding directly or through inescapable implication that joint through rates for application over routes open only at combinations may not be prescribed where such joint rates are not needed or desirable in the public interest under Section 15 (3) or contravene the limitations on the power to establish through routes and joint rates as set forth in Section 15 (4) are *Roanoke City Mills v. A. & R. Rr. Co.*, 266 I. C. C. 693, 701; *Adrian Grain Co. v. Ann Arbor R. R. Co.*, 276 I. C. C. 331, and *Penn. Rr. v. U.S.*, 323 U.S. 588, upholding the Commission's order in *D. A. Stickell & Sons, Inc. v. Alton R. Co.*, 255 I. C. C. 333. In the latter case, the Supreme Court said at page 590:

> "The Commission's authority to grant relief [i.e., establish joint through rates] *is bottomed* on Sections 15 (3) and (4) * * *." (Emphasis ours.)

D. The Commission's Attempt to Proceed Entirely Outside the Powers Granted by Section 15 (3) as Limited by Section 15 (4) Rendered its Order Void.

It follows from what has gone before that the Commission in the instant case could not lawfully order joint through rates from Montana Western to Great Northern points on the ground that such rates are necessary or desirable in the public interest under Section 15 (3) so long as the real purpose of the order was to assist the Montana Western in meeting its financial needs, contrary to the terms of Section 15 (4).

We have already pointed out (Subdivision I-A of this Argument) that the Commission's order was not made and could not have been made under Section 15 (1).

There are no statutory provisions authorizing the prescription of joint through rates except Section 15 (1), and Section 15 (3) as limited by Section 15 (4).

The District Court rightly held the Commission's order expressly prohibited by the terms of Section 15 (4).

II.

Establishment of Divisions of Joint Through Rates—District Court Rightly Held Invalid Commission's Order Purporting to Prescribe Divisions of Joint Rates Without the Basic or Essential Findings Upon Which the Power of Prescription is Conditioned.

Section 15 (6) provides in part:

> "Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares or charges, *applicable* to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial *as between the carriers parties thereto* (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers * * * ." (Emphasis ours.)

In *Beaumont, S. L. & W. Ry. Co. v. U. S.*, 282 U. S. 74, at page 82, this Court said;

> "The Commission may not change an existing division unless it finds that division unjust or unreasonable. *Brimstone R. R. Co. v. United States*, 276 U. S. 104, 115; Cf *Interstate Commerce Commission v. Louisville & N. R. R.*, 227 U. S. 88, 92."

See also, *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, 356-7, quoted *supra*, p. 37.

The District Court stated, with respect to the Commission's order:

> "The order fixing divisions was entered without any finding in the report that any existing divisions have been, are, or will be unlawful or that the existing apportionment of through charges has been, is, or will be unlawful in any respect." (R. 602.)

This failure to make findings influenced the District Court to conclude that the Commission's order was invalid and should be set aside. (R. 593, 603-604.)

Appellants do not, and cannot, contend that the Commission made those findings which Section 15 (6) makes prerequisite to any prescription of divisions, that is, findings that existing divisions "are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto." They simply argue: "The Commission made the only finding that it could: that the divisions prescribed [for the future] were just, reasonable and equitable." (Brief of U. S. & I. C. C., p. 25.) This demonstrates that the Commission failed to find what the statute calls for. The following cases hold that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or jursidictional facts conditioning the power of the Commission: *Florida v. United States*, 282 U.S. 194, 215; *United States v. Chicago, Milwaukee, St. P. & P. R. Co.*, 294 U. S. 499, 510-511; *Eastern-Central Motor Carriers Assoc. v. U. S.*, 321 U. S. 194, 211-212. In *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, this Court said at page 489:

> "Congress has made a grant of rights to carriers such as appellee. Congress has prescribed statutory standards pursuant to which those rights are to be determined. Neither the Court nor the Commission is warranted in departing from those standards because of

any doubts which may exist as to the wisdom of following the course which Congress has chosen. Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process. *If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made 'prerequisite to the operation of its statutory command.' Opp Cotton Mills, Inc., v. Administrator,* 312 U. S. 126, 144." (Emphasis ours.)

The fact that the Commission here made "the only finding it could," that is, that it could not, in view of the absence of existing joint rates and divisions, make the jurisdictional findings which Congress makes "prerequisite to the operation of its statutory command," confirms our argument heretofore advanced (Point I, B, 2, *supra*, pp. 33 to 41), that the statutes do not contemplate or authorize the prescription of joint rates and divisions simultaneously and that until joint rates are established and there are revenues thereunder to be divided, the Commission's authority to fix divisions is not properly invoked.

We have already commented upon the Commission's failure to make findings with respect to the reasonableness or lawfulness otherwise of the separately established propor-

tional rates entering into the existing combinations. The reasonableness and lawfulness of these separate proportional rates was not attacked in the complaint of the Valier Community Club or in the evidence, and the Commission, therefore, had no occasion to make findings thereon. The order which attempts to supplant such existing proportional rates by joint through rates and divisions which would deprive the Great Northern of revenues under reasonable charges is not and cannot be supported by findings justifying this attempted exercise of power. This demonstrates that the Commission has operated wholly outside both those statutes which give it authority to establish rates and those which authorize the prescription of divisions.

III.

The District Court Correctly Held That the Commission's Order was not Sustained by the Evidence.

The Commission's order in prescribing joint through rates on the same levels as existing combination rates was not sustained by the evidence, for the evidence of the Montana Western's financial needs, which was what motivated the Commission's action, was not evidence which, under Section 15 (4), could justify that result.

The Commission's order purporting to prescribe divisions was likewise unsupported by and, in fact, contrary to the evidence.

We show in the discussion which follows that the four factors previously mentioned (supra, pp. 16 to 18) entering into the Commission's decision as to divisions do not in any way support the Commission's determination of that issue.

The Appendix-10 scale, the first factor, appears to have been considered proper, both as a standard for testing the relative existing allocation of revenues under the present reasonable proportional rates, and as a basis for the divisions prescribed, upon the assumption that transportation conditions attending the movement of Montana Western grain were comparable to those attending the movement of class-rated traffic in the East. Such assumption must not only have been outside the record but contrary to the evidence in the record. (See discussion *supra*, pp. 15, 17). The Commission itself has said with respect to the grain rate structure and the traffic thereunder, in *Grain To, From and Within Southern Territory*, 259 I. C. C. 629, 638:

> "As is well known, the grain-rate structure of the country is a law unto itself and has peculiarities which have no parallels in the rates on other commodities."

It is significant also that even the Appendix-10 scale, borrowed without warning from a completely unrelated case, did not provide the formula the Commission adopted in prescribing divisions for the future. The order provides for the *adjustment of divisional factors based on that scale upwards by 20 percent when used in fixing Montana Western divisions and downward 10 percent when used in fixing Great Northern divisions on traffic to Minneapolis and Duluth*, where most of the Montana Western grain goes. (R. 25).

The second factor, the Commission's comparison of car-mile revenues under the proportional rate from Conrad to Minneapolis with car-mile revenues under local rates established under conditions not shown of record (R. 23), likewise furnishes no support for the order requiring the carriers to cease charging present rates and to establish the prescribed divisions. The complete impropriety of these rate

comparisons appears from *Baltimore & Ohio R. Co. v. United States*, 298 U.S. 349, 357, where this court said, with respect to a Commission order fixing divisions, that "the question whether * * * [the Commission] complied with the * * * Act does not depend upon the level of the rates or the amounts of revenue to be divided."

The third factor apparently considered by the Commission, that on traffic to Minneapolis and Duluth the Great Northern's services are those of an "intermediate" carrier and the further supposed circumstance that "in some instances it receives additional revenue on the traffic beyond those two points" (R. 22) is, as we have shown, *supra*, p. 18, completely unsupported by any evidence. Even if, however, there were evidence that the Great Northern received revenues on Montana Western grain for transportation which takes place beyond its eastern terminals of Duluth and Minneapolis—which is impossible to imagine except in the case of such traffic, if any, as might move over its own line *between* Minneapolis and Duluth—this circumstance would have no bearing on the compensation the Great Northern is entitled to receive for services *up to* Minneapolis and Duluth. The Great Northern is legally entitled to maintain rates on traffic moving between Minneapolis and Duluth on a reasonable basis, and it cannot maintain rates on such traffic higher than would otherwise be justified simply because it may not happen to receive the compensation to which it is entitled on grain moving from country points to these terminals. It follows that the Commission may not deprive it of compensation to which it would otherwise be entitled on the haul up to these terminals simply because it may participate in movements of traffic going beyond. In *Chicago, Milwaukee & St. Paul Ry. v. Public Utilities Commission of Idaho*, 274

U. S. 344, there was involved the reasonableness of intrastate rates on logs moving to the lumber mills. The Idaho Commission defended the log rates on the ground that their reasonableness must be determined by taking into account not only the revenue from the transportation of the logs but also the revenue from the subsequent transportation of the lumber made from such logs. This Court held that this contention was invalid, saying (at pp. 350-351):

> "The carriers cannot maintain interstate lumber rates higher than otherwise justified by showing that they suffer loss or have inadequate returns from the intrastate transportation of logs. *The State has no power to require petitioners to haul the logs at a loss or without compensation that is reasonable and just, even if they receive adequate revenues from the intrastate log haul and the interstate lumber haul taken together.*" (Emphasis supplied.)

So here, the participation by the Great Northern in the movement of grain beyond Minneapolis and Duluth, if in fact it so hauls any Montana Western grain, which is not shown, cannot affect the amount of compensation to which it would otherwise be justly entitled on grain moving between Montana Western points and these terminals.

The fourth factor assigned, the financial condition of the Montana Western, has already been discussed. There was and could be no consideration of the financial needs of the Great Northern, for there was no evidence thereof. Appellants, appreciative of the fact that "equitable" divisions cannot be determined on a one-sided consideration of financial needs, state on brief that the fact that the Commission compared "the car-mile yield which Great Northern obtains on grain traffic generated by its own branch lines in adjacent

areas with the car-mile yield on grain traffic originated by Montana Western, indicates that the Commission "considered the revenue needs of the Great Northern." (Brief of U. S. and I. C. C., p. 42.) The car-mile yield, or car-mile revenues or car-mile earnings, so-called, on any particular movement are calculated simply by dividing the freight charge on such individual movement by the number of miles the car moves. Certainly, the number of cents per car-mile which may be yielded on any particular type of traffic a railroad carries from one or more branch lines—which may or may not be operated at a loss—is no indication of "the amount of revenue required to pay * * * [its] operating expenses, taxes and a fair return on * * * [its] railway property held for and used in the service of transportation," which is the specific evidence that Section 15 (6) requires to be considered in an adjudication upon divisions. Appellants' argument is completely answered by the decision of this Court in *Brimstone R.R. v. U. S.*, 276 U. S. 104. There the Commission had considered evidence of existing and past divisions of joint rates, evidence of the volume and distribution of the traffic and evidence of the financial needs of only one of the carriers. Upon such consideration the Commission had ordered a readjustment of divisions decreasing the Brimstone railroad's share thereof on the ground that such share was disproportionately high (276 U. S. 114). There was no evidence, except such facts as may have been implied from the nature of the divisions considered by the Commission and from the volume and distribution of the traffic that the carriers connecting with the Brimstone "were in need or had or would receive more or less than a fair return from agreed divisions * * * or that the agreed divisions were 'unjust, unreasonable, inequitable, or unduly preferential or prejudi-

cial as between the carriers.'" (276 U. S. 115). This Court said at pages 115-116:

> "Counsel suggest that in addition to facts revealed by studies of the Brimstone Company's affairs, the Commission did consider existing division sheets of joint rates, volume and distribution of traffic, past division sheets, divisions accorded to the Brimstone Company by the Federal Director-General, also testimony showing competition controlled the agreed divisions. *But the very definite command of Section 15(6) required more than that.*" (Emphasis supplied.)

And it concluded, p. 117:

> "The record discloses that before making the challenged order the Commission failed to consider the items definitely specified by Section 15 (6). And it must be annulled."

See to the same effect *United States v. Abilene & So. Ry. Co.*, 265 U. S. 274, a divisions case involving a similar situation, where Mr. Justice Brandeis, speaking for a unanimous court, said at page 288:

> "* * * a finding without evidence is beyond the power of the Commission."

The Commission itself has held, in harmony with these cases, that "consideration must be given not only to the necessities of the short line but also to the condition and requirements of the connecting lines, having due regard to their revenues, expenses, taxes, and return, and considering their operating burdens and the efficiency of their management." *Nevada-California-Oregon Divisions*, 73 I. C. C. 330, 331. See to the same effect, *Division of Joint Rates and Fares of M. & N. A. R. R. Co.*, 68 I. C. C. 47, 58.

The Commission's report and order in the present case, which purports to deprive the Great Northern of revenues on the basis of justice and equity under Section 15 (6), is void because the Commission acted here, as in the *Brimstone* and *Abilene* cases, without evidence of record as to the revenue needs of one of the participants in the through revenues. Therefore, there was no basis for determining whether existing proportions were unjust, unreasonable, inequitable or preferential or prejudicial as between the carrier, or for determining what future divisions would be just, reasonable and equitable and free from prejudice as between the parties to the divisions.

It is evident from the foregoing that the Commission's order not only has no "rational basis in the record" (see Brief of U. S. and I. C. C. page 40), but that it was made in disregard of the evidence and in disregard also of the specific standards "which Congress has made 'prerequisite to the operation of its statutory command'" *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 489, quoted supra.

IV.

The Commission Deprived Appellee of a Full Hearing Contrary to the Provisions of Sections 15 (3) and 15 (6) and in Contravention of the Requirements For Due Process.

The District Court did not decide the case below on the ground that the Commission had not accorded Great Northern a "full hearing" as required by Sections 15 (3) and 15 (6) and by fundamental requirements for due process.

It did not have to. It could easily have determined, however, that a full hearing was denied.

When the Commission overruled Great Northern's motion to dismiss the divisions phase of the case until it should first be determined whether or not joint through rates should be ordered, it brought about a situation entirely different from that considered in *United States v. Pierce Auto Lines*, 327 U. S. 515, 523, to which appellants have referred the Court (Brief of U. S. and I. C. C., p. 28), and which involved merely the consolidation for hearing and disposition of two "closely related" motor carrier applications under similar principles of law. Here the forced consolidation of the joint rates and divisions phases of the case brought together on one record for a common determination such incompatible issues that a correct determination of either matter was beyond the realm of possibility. The confusion thus created was aggravated by incorporation into the record in the joint rate case, over objection (R. 433-434), of more than 700 pages of testimony and 28 exhibits in the abandonment case, practically all of it dealing with the finances of the Montana Western, which, under Section 15 (4), could not be considered in the joint rate case. From the procedural standpoint the Commission's action here was not wholly unlike the action of the Commission considered by this Court in *Powell v. U. S.*, 300 U. S. 276, 289. There it was held that in a proceeding where the validity of a tariff was in issue the Commission should not have considered or given weight to its findings in a separate public convenience and necessity proceeding, which, of course, had "no bearing on the validity of the tariff."

In addition, the Commission's assumption, entirely *de hors* the record, even as enlarged by the incorporation above referred to, that class-rated traffic in the east moved under conditions comparable with the movement of Montana Western grain so as to permit the respective proportional rates of Montana Western and Great Northern to be tested by the Appendix-10 scale, which had not been previously referred to in the entire record before it, likewise indicates the extent to which due process was disregarded.[18] A somewhat similar action of the Commission in giving weight "to matters * * * treated as evidence when not introduced as such" was condemned by this Court in *U. S. v. Abilene & S. Ry. Co.*, 265 U. S. 274. And one of the primary reasons that such action was there considered a prejudicial denial of the right to a "full hearing" under the Act and the Fifth Amendment to the Federal Constitution was that, in the language of Justice Brandeis at page 289:

> "* * * the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that in an adversary proceeding specific reference be made, is essential to the preservation of the substantial rights of the parties."

[18] The report contains a misstatement in the first sentence in the third paragraph on page 525 of 275 I. C. C. (R. 23) to the effect that "the first-class rates of the Montana Western" were "used by the Great Northern as prorating factors in an endeavor to show the reasonableness of the proportional rates." The Great Northern did not introduce evidence as to the first-class rates of the Montana Western, and there was no evidence whatever in the record as to what such rates were. Nor was there any testimony in the entire record as to any class rates whatever, or to any class-rated traffic. These first-class rates were referred to for the first time in the proposed report (R. 578) of Examiner Witters, who must have obtained them from sources outside the record. The Commission did not adopt the recommended report of Examiner Witters, and apparently believed that the record actually contained evidence as to such class rates and that it should discuss them in its report.

The Commission itself followed this decision in *Texas & Pac. Ry. Co. v. Atchison, T. & S. F. Ry. Co.*, 176 I. C. C. 388, where it said at page 390:

> "Complainant also urges that we can give due consideration to the matters enumerated in Section 15 (6) by taking judicial notice of facts contained in other reports and records on file with us. In this complainant is clearly in error. *U. S. v. Abilene & So. Ry. Co.*, 265 U. S. 274."

In *Erie R. Co. v. U. S.* (S. D. Ohio, E. D.), 59 F. Supp. 748, the court set aside a Commission decision not based on the evidence "but on the basis of its decisions in other cases." It appeared there that the Commission had condemned rates on scrap iron between certain points in official territory which were higher than 70 percent of the rates on iron and steel articles solely on the basis of "the many proceedings wherein the 70 percent basis was prescribed" and without evidence that transportation conditions involved in the other proceedings were comparable with those of record. The Court there said (p. 750):

> "A decision which is not grounded on evidence fails to apply the standard of 'full hearing' set by Congress as a guide to the Commission in the performance of its quasi-judicial duties. * * * Here it is impossible to say that the legislative standard has been properly applied."

One difference between the *Erie Case* and this one is that there the evidence of comparable transportation conditions, which was lacking, could have been and was in fact later supplied after the Commission reopened the case (See *Erie R. Co. v. U. S.*, 64 F. Supp. 162); while in the instant case none

of the parties has contended, or could seriously contend, that grain from the Montana Western moves under transportation conditions comparable with class-rated traffic or that the matter before the Commission when it arrived at the Appendix 10 scale in *Class Rate Investigation, 1939*, fairly represent conditions on either the Montana Western or Great Northern with respect to grain.

V.

The District Court's Holding Will Aid Rather Than Hinder the Commission in Performing the Duties Imposed by Congress.

Appellants suggest that the District Court's holding will "shackle the Commission in the performance of the duties imposed upon it by Congress" (Brief of U. S. and I. C. C., pp. 44-47). The duties imposed, of course, are defined by the Interstate Commerce Act. One of those duties is to refrain from the prescription of through routes and joint rates for the purpose of assisting a carrier that would participate therein to meet its financial needs. Section 15 (4). If the Commission follows the Court's decision applying this plain Congressional mandate, it will be performing a duty which Congress prescribes. Unless the Commission misconceives its obligation under the Act, it cannot be "shackled" by a court decision which applies the law. In one of its reports, *Kansas City S. Ry. Co. v. Kansas Term. Ry. Co.*, 211 I. C. C. 291, the Commission well said, at page 304:

> "We are invested with no roving commission to carry out the policy of Congress; our powers are those delegated to us by the various sections of the Interstate Commerce Act * * *."

The Commission's action here was not only entirely outside the fair intendment of its delegated powers. It was, in fact, expressly forbidden by the Act. Certainly it was not in performance of a duty imposed by Congress.

Should the District Court's judgment be affirmed, the Commission would still have the power to reconsider its order denying the Montana Western's application for abandonment, the effective date of which has now been postponed "until the further order of the Commission" (R. 48-49). It is not uncommon for the Commission to reopen abandonment proceedings where events which have occurred since the close of the record suggest the propriety of that course. In the event of affirmance of the judgment below, the problem whether the Great Northern can be compelled to assume the burden of the continued operation of the Montana Western will be resolved. Montana Western might then, before proceeding with its application, consider increasing its grain rates if, in truth, trucking is as impracticable as appellants here contend. If the Montana Western should then still desire to abandon operations, and if the application should then be reconsidered by the Commission, the issue of whether public convenience and necessity would permit granting of the application could be determined by the Commission in the light of the evidence then before it and with a clear understanding of the standards established by Congress for determination of that question. The District Court, in its opinion in support of the judgment appealed from, said:

> "If those served by Montana Western feel the need of revitalizing it financially there is no legal barrier to their furnishing the necessary funds for its further operation. We are of the opinion that the Great Northern

cannot be compelled, directly or indirectly, to assume that burden." (R. 594)

CONCLUSION

It is respectfully submitted that the judgment and decree of the District Court should be affirmed.

Dated at St. Paul, Minnesota, this 31st day of December, 1951.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing brief upon all parties to the appeal herein by mailing to counsel for each of the appellants a true and correct copy thereof, each of said copies being properly enveloped and addressed and deposited in the United States mail, at St. Paul, Minnesota, with postage prepaid.

Dated at St. Paul, Minnesota, this 31st day of December, 1951.

LOUIS E. TORINUS, JR.,
Of Counsel

APPENDIX "A"

Applicable Constitutional and Statutory Provisions

Constitution of the United States of America, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

National Transportation Policy. (U. S. Code, Title 49, notes preceding secs. 1, 301, 901, and 1001; 54 Stat. 889).

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a

national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 1 (4) (U. S. Code, Title 49, Sec. 1 (4); 54 Stat. 900).

It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Section 15 (1) (U. S. Code, Title 49, Sec. 15 (1); 48 Stat. 1102).

That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any

pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonabie, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed ,as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Section 15 (3) (U. S. Code, Title 49, Sec. 15 (3); 54 Stat. 911).

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

Section 15 (4) (U. S. Code, Title 49, Sec. 15 (4); 54 Stat. 911).

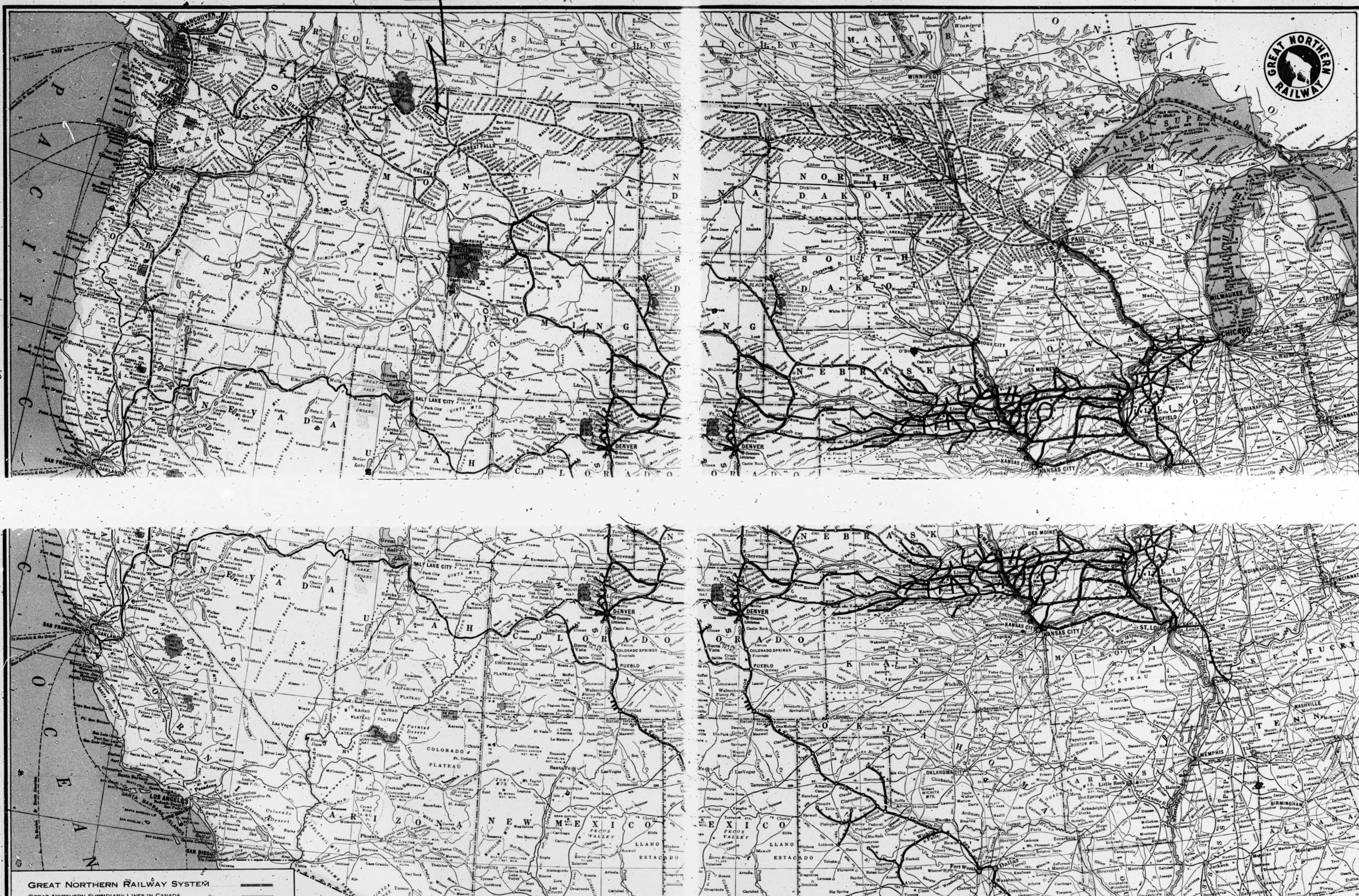
In establishing any such through route the Commission shall not (except as provided in section 3, and except where

one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however*, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

Section 15 (6). (U. S. Code, Title 49, Sec. 15 (6); 41 Stat. 486).

Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originat-

ing, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.


GREAT NORTHERN RAILWAY
GREAT NORTHERN RAILWAY SYSTEM
GREAT NORTHERN SUBSIDIARY LINES IN CANADA
BURLINGTON LINES
SPOKANE, PORTLAND & SEATTLE RAILWAY
(AND ITS SUBSIDIARY LINES)
Other Railroads
Steamship Lines
Standard Time Division
Statute Miles
Kilometers
McGILL-WARNER CO., ST. PAUL, MINN., U.S.A.
1943
PACIFIC OCEAN
GULF OF MEXICO
GULF OF CALIFORNIA
MEXICO